

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SINGH v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 815

MIGRATION – Application to review decision of Migration Review Tribunal – whether failure to deal with claims of the applicant or to make enquiries.

Migration Act 1958, ss.357A, 359A, 363
Migration Regulations 1994

Abebe v Commonwealth (1999) 197 CLR 510
Antipova v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 584
Azzi v Minister for Immigration & Multicultural Affairs [2002] FCA 24
Gomez v Minister for Immigration & Multicultural Affairs (2002) 190 ALR 543
Dranichnikov v Minister for Immigration & Multicultural Affairs (2003) 197 ALR 389
Luu v Renevier (1989) 91 ALR 39
Minister for Immigration for Immigration & Multicultural & Indigenous Affairs v Lay Lat [2006] FCAFC 61
Minister for Immigration and Multicultural Affairs v Dunne [1999] FCA 204
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004) 207 ALR 12
Prasad v Minister for Immigration & Ethnic Affairs (1985) 6 FCR 155
Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S154/2002 (2003) 201 ALR 437
SXFB v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 164

Applicant:	REENA DEVI SINGH
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG1066 of 2004
Judgment of:	Barnes FM

Hearing date: 17 May 2006

Delivered at: Sydney

Delivered on: 16 June 2006

REPRESENTATION

Counsel for the Applicant: Mr D. Burwood

Solicitors for the Applicant: Mark Clisby Solicitor

Counsel for the Respondent: Mr T. Reilly

Solicitors for the Respondent: Sparke Helmore

ORDERS

(1) That the application is dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG1066 of 2004

REENA DEVI SINGH
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Migration Review Tribunal (the Tribunal) made on 12 March 2004 affirming a decision of a delegate of the first respondent that the applicant was not entitled to the grant of a Partner (Temporary) (Class UK) visa and a decision to refuse to grant her a Partner (Residence) (Class BS) visa. The applicant's three children were included in the visa and review applications (although the delegate did not include them in his decision as they were not in Australia at the time of application and decision). The children are not included in the application to this Court.

2. The applicant entered Australia on a visitor visa in 1998. That visa expired on 4 January 1999. The applicant applied for a protection visa on 2 May 2001 but withdrew her application on 15 May 2001. Relevantly, she applied for permanent residence on 27 June 2001 on the basis that she was the de facto spouse of her nominator.
3. The applicant claimed to have met the nominator in December 1998 and to have been in a de facto relationship with him since 17 December 1998. The Tribunal recorded that the applicant claimed to have been living with the nominator in Queensland from December 1998, but that on 16 July 2001 she requested that a Medicare card be sent to her current address in Parramatta, New South Wales and that on 17 July 2001 the Department “recorded receiving a call” from the nominator advising that the relationship had broken down eight months earlier when the nominator left the marital home in Queensland. However a supporting statement from the nominator was provided to the Department by the applicant in June 2002.
4. The Department visited the nominator’s home on 25 June 2002. The applicant was not present. The nominator was recorded as having stated that the applicant stayed at the home on an “on and off” basis. When asked if the relationship was continuing he said he would like it to but the applicant had drifted back to her family. It was recorded that there were no belongings in the house that could be connected to the applicant. The nominator claimed that he wished to withdraw his sponsorship of the applicant and, among other things, that she only lived with him for three months during the year 2001 and otherwise stayed with her family in Sydney. In a later telephone call the nominator said that the applicant had moved down to Sydney “about two years ago”, contrary to what the applicant’s mother told the Department.
5. The applicant was interviewed by a Departmental officer on 1 July 2002 and provided a signed statement. She claimed that the relationship was genuine and continuing but because of the nominator’s continued drinking he would not always let her in the house. In a signed statement she said that she had lived with the nominator from December 1998 until January 2001 (despite his drinking), staying in Sydney for two or three months, returning to

Queensland in March 2001 and travelling back to Sydney in April 2001. She claimed that between April 2001 and May 2002 she spent approximately eight months in Brisbane with the nominator and undertook to provide travel records to the Department. She did not do so. The applicant told the Department that the nominator had inflicted domestic violence on her starting on 21 June 2002.

6. Thereafter the nominator provided a statement that the applicant had not lived with him for some time and, in particular, that they had not been living together in December 2000. He provided supporting statements from other persons. He suggested that the applicant spent most of her time living in Sydney with her mother. He sought to withdraw his sponsorship. He sent the Department a copy of a statement made by the applicant in an application for a temporary protection order dated 21 June 2002 in which she had stated that for about three years until the year 2000 she was involved in a de facto relationship with the nominator and “*Since then I have been living in and (sic) on and off de facto relationship with him*” and claimed that she had separated permanently on 21 June 2002.
7. On 22 July 2002 the applicant provided further details of domestic violence said to have been perpetrated by the nominator (in particular on 17 and 18 June 2002). However the applicant also told the Department that since 20 June 2001 she had been working as a part time (casual) assistant nurse at a hospital in Sydney, New South Wales (and this was later confirmed by information from a community services organisation).
8. The application was refused on 27 August 2002. The applicant sought review by the Tribunal on 25 September 2002. In a submission to the Tribunal the applicant provided further information, including a copy of an apprehended domestic violence order obtained against the nominator by his previous wife dated 30 January 1998 and a statement from her son that he witnessed the drunken and intimidating state of the nominator and advised his mother to leave him.
9. On 7 October 2003 the Tribunal wrote to the applicant pursuant to s.359A of the *Migration Act 1958* (Cth) (the Act) inviting her to comment on information, including information that it was said may indicate that she was not in a genuine and continuing relationship two

years prior to and at the time of the visa application. Her migration agent responded by letter of 11 November 2003 focusing primarily on allegations of domestic violence. The applicant attended a Tribunal hearing on 13 January 2004. The transcript of the hearing is before the Court.

10. The only subclass of the Class UK temporary visa that was relevant was subclass 820 (spouse). The criteria for such a visa to be satisfied at the time of application include the criteria in clause 820.211 of Part 820 of Schedule 2 to the Migration Regulations, the relevant parts of which are as follows:

820.211(2) An applicant meets the requirements of this subclause if:

(a) The applicant is a spouse of a person who:

(i) Is an Australian citizen, an Australian permanent resident or eligible New Zealand citizen;

.....

(c) The applicant is sponsored ... by the spouse.

(d) In the case of an applicant who is not a holder of a substantive visa – either:

(i) The applicant

A entered Australia as the holder of a subclass 995 (Diplomatic) visa or as a special purpose visa holder who at the time of entry met the requirements of subclause (2A); and

B satisfies Schedule 3 criterion 3002; or

(ii) The applicant satisfied Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.

11. In its reasons for decision the Tribunal pointed out (and as is not disputed) that the applicant last held a substantive visa (a visitor visa) on 4 January 1999. She did not lodge the application for a partner visa until 27 June 2001. Hence she did not satisfy criterion 3001 in Schedule 3 to the Migration Regulations which requires that the visa

application must be made within 28 days after the applicant last held a substantive visa. As the visa applicant did not satisfy criterion 3001 the Tribunal found that the visa could only be granted if she was able to establish that there were compelling reasons for not applying the Schedule 3 criteria as provided for in subparagraph 820.211(2)(d)(ii).

12. The Tribunal set out and had regard to relevant policy in relation to the circumstances to be taken into account in assessing whether there are compelling reasons. Such policy (to be found in Departmental Procedures Advice Manual 3 (PAM3)) was said to require the decision-maker to take into account the circumstances which the Minister considered to be compelling, which were that there were Australian citizen children from the relationship or *“the applicant and their sponsor are already in a long-standing spousal relationship (taken to be a relationship which has existed for at least two years)”*. The policy recognised that there may be other circumstances in which there were compelling reasons.
13. The Tribunal considered whether there were compelling reasons for not applying the Schedule 3 criteria at the time of the visa application. It found that there was no evidence of any Australian children from the relationship. It then considered whether the applicant and the nominator were in a long-standing spouse relationship which had existed for at least two years at the time of the visa application.
14. The Tribunal referred to *Minister for Immigration and Multicultural Affairs v Dunne* [1999] FCA 204 in which Branson J held that the expression “compelling reasons” *“involves something in addition to the basic pre-requisite criteria for the grant of the visa”*. The Tribunal stated *“Applying Dunne, the Tribunal has not made a finding as to whether the primary visa applicant meets the definition of spouse of the nominator at the time of application, pursuant to regulation 1.15A, because that is a basic pre-requisite for the grant of a visa”*.
15. The Tribunal outlined the evidence before it (as discussed further below) and concluded that on balance it was not satisfied from the evidence that the applicant and the nominator were in a longstanding spouse relationship of at least two years at the time of application (27 June 2001).

16. Nor was the Tribunal satisfied that the evidence the applicant had presented in relation to her allegation that she was the victim of domestic violence perpetrated by the nominator established that at the time of application there were compelling reasons for not applying the Schedule 3 criteria. It also found that there was no other evidence before it that established compelling reasons for not applying Schedule 3 criteria.
17. Accordingly, the Tribunal found that the applicant did not satisfy paragraph 822.211(2)(d). The Tribunal went on to state “*The Tribunal has not made findings in regard to the evidence presented of alleged domestic violence that the primary visa applicant claim was perpetrated against her by the nominator. This is because the Tribunal has found that the primary visa applicant has not satisfied an essential criterion at the time of application for the grant of a subclass 820 visa.*”
18. The Tribunal affirmed the decision under review finding that as the applicant did not meet the essential criteria for the grant of a Class UK temporary visa she also did not meet the essential criteria for the grant of a Class BS visa.
19. The applicant sought review by application filed in this Court. She now relies on an amended application filed on 8 May 2006. That application contains four grounds. In oral submissions counsel for the applicant told the Court that grounds 3 and 4 were not pressed. Accordingly the grounds relied on are as follows:
 1. *The Tribunal failed to deal with the claims of the applicant as they related to the alcoholism of the nominator;*
 2. *There was a failure by the Tribunal to enquire where, in the circumstances, the Migration Review Tribunal must have known the significance of addressing the evidence relating to the nominator’s alcoholism and the role it might play in obviating Schedule 3 criteria.*

Whether Tribunal failed to deal with claims

20. It was first contended for the applicant that the applicant’s claims as they related to the alcoholism of the nominator were not dealt with by

the Tribunal. It was said to be relevant to have regard to the material before the Department and the Tribunal and to what occurred in the Tribunal hearing. In a letter accompanying the applicant's visa application of 27 June 2001 her then migration agent had stated that the applicant was looking after the sponsor and that they had been living together since 1998. The sponsor had lost his left leg through knee amputation following an accident in 1993. It was stated that the couple had been married "as per Hindi religious customs" and had been living together since then. In the application form it was claimed that the applicant and the sponsor commenced a de facto relationship on 17 December 1998.

21. Among other documents provided to the Department were copies of two medical reports from 1995 in relation to the nominator's rehabilitation prospects after his 1993 accident and the amputation of his leg. Counsel for the applicant drew attention to the 1995 report from Associate Professor Jones, indicating that Professor Jones regarded the nominator as independent in personal care and activities of daily living, albeit restricted in mobility and stated that he would expect him to return to work and have the potential to remain in economically viable employment to the age of 55. However it was contended for the applicant that it was also relevant to have regard to a report from a Dr Cameron dated 21 January 2001 (which had been prepared at the request of the nominator and the applicant who had advised Dr Cameron she intended to use the information in support of an application for a permanent visa). That report stated that the nominator's mobility was considerably restricted by his injuries and also that he had severe liver disease consistent with chronic alcohol abuse and required assistance with some everyday activities (although this was said to be mainly in light of his restricted mobility and cancellation of his driving licence). Dr Cameron recorded that the applicant had stated that she currently performed these tasks for the nominator.
22. It was also said to be relevant to have regard to a Departmental file note of an interview with the applicant on 1 July 2002 in which the applicant maintained, when asked if the relationship had ended, that it was still genuine and ongoing "*however because of the nominator's continued drinking he would not always let her in the house*". It may

be noted however that the record of interview records that subsequently the applicant reconsidered and suggested that the relationship may have ended and that domestic violence “*began on Friday 21 June 2000.*” Further, while the applicant undertook to provide evidence of proof of flights between Sydney and Brisbane in the 12 months preceding the interview or other evidence of having spent the amount of time in Brisbane she claimed, in the delegate’s reasons for decision it is recorded that no such further evidence was provided. In her signed statement the applicant claimed she was still in a genuine and continuing relationship.

23. Counsel for the applicant referred to the fact that in the applicant’s written statement of 1 July 2002 she had made several references to the nominator’s drinking problem from the time they moved into the new house in Queensland in January or February 2000, to his hospitalisation and continued drinking and stated: “*so, I went to Sydney in January 2001*” and thereafter spent time in both Sydney and what she described as her “*usual residence*” in Brisbane.
24. Also before the Tribunal was a medical certificate dated 6 April 2002 stating that the nominator had severe alcoholic liver disease (although also that he lived alone and had difficulty caring for himself, had no-one to care for him and requested that his mother be allowed to come to Australia from Fiji to care for him). In a letter to the Department of 22 July 2002 the applicant reiterated (when discussing the events of June 2002) that the nominator “*is often very drunk*”.
25. The Tribunal wrote to the applicant on 7 October 2003 under s.359A of the Migration Act seeking her comment on information the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review. The applicant was asked to comment on particular items of information which, the Tribunal stated, may indicate she was not in a genuine and continuing relationship two years prior to and at the time she lodged an application for a spouse visa (that being relevant as one of the circumstances considered to be a compelling reason not to apply Schedule 3 criteria). Relevantly, in addition to a number of other matters, reference was made to the applicant’s statement of 1 July 2002 in which she stated that in January 2001 she had left the nominator due to his excessive drinking and remained in

Sydney for two or three months and that from April 2001 to May 2002 she spent eight months in Brisbane (although she also admitted that she had been working as a nursing assistant since May 2001 on a part-time (casual) basis in Sydney and continued to do so in 2003).

26. Counsel for the applicant also drew attention to the applicant's response to the s.359A letter of 11 November 2003 in which she referred to the nominator's drunkenness (in the context of stating that she decided to leave the nominator and separated from him on 21 June 2002 and describing alleged domestic violence). Also provided to the Tribunal was an apprehended violence order against the nominator obtained by his previous wife in February 2002 where the circumstances alleged included that he consumed alcohol daily. Further, a report from Dr Dean, a psychologist, dated 5 February 2004 recorded that the applicant claimed that in the middle of the year 2000 the nominator had started drinking heavily and that he locked her outside the home when he was very drunk.
27. On the basis of this information it was contended for the applicant that it was her case that she had a genuine spousal relationship with the nominator, but, due to the circumstances of his alcoholism, was unable to live at all times with him. It was observed that in its findings and reasons the Tribunal had recorded the applicant's statement that she was committed to the relationship and tried to help the nominator resolve his drinking problem, but it was contended that in light of the applicant's contentions and the evidence before it, the Tribunal should have made findings regarding the applicant's claims that the nominator's alcoholism affected the relationship and its continuity and should have considered whether the nominator's condition was a factor in the apparent "on and off" nature of the relationship as opposed to taking the approach that the "on and off" nature reflected that the relationship was not genuine.
28. It is the case that in its reasons for decision the Tribunal did not discuss the content of medical records and reports in relation to the nominator and his alcoholism. However the Tribunal recorded, as part of the evidence before it, the statements made by the applicant concerning the claimed history of domestic violence in her application for a temporary protection order dated 21 June 2002 and in her written statements (in

which she outlined her claims that she was a victim of domestic violence perpetrated by the nominator and provided a detailed account of physical and verbal abuse alleged to have occurred on 16 and 17 June 2002). It also described the apprehended domestic violence order obtained against the nominator by his previous wife in 1998 and referred to the statement from the applicant's son that he had witnessed the drunken and intimidating state of his mother's nominator and advised her to leave him as it was unsafe for her to live with him. Reference was also made to the psychological assessment of the applicant provided to the Tribunal from Dr Dean.

29. In the findings and reasons part of its decision the Tribunal considered whether there was a long-standing spousal relationship as at 27 June 2001. It recorded the applicant's claims that she and the nominator began living together in December 1998, that she submitted a Queensland telephone bill in her name payable by 17 October 2000, wills made by herself and the nominator dated 18 January 2001 and photographs. She claimed that they had rented a unit before moving into a home in Queensland, but the Tribunal noted that there was no evidence of a residential lease for the flat or that the property in Queensland was jointly owned. It recorded the applicant's explanation the nominator wanted to keep financial matters separate and that they did not have any joint financial arrangements. Importantly, the Tribunal then stated:

The primary visa applicant explained that after she and the nominator moved into the new house, the nominator's problems with alcohol became worse, and this is why she spent a lot of time in Sydney. She acknowledged that they had an 'on-off' relationship. She stated that she was committed to the relationship and tried to help the nominator resolve his drinking problem, but when the nominator started to abuse her physically she decided she could not ruin her life in order to continue to try to help him.

30. The Tribunal went on to find that there was little evidence regarding aspects of the relationship between the nominator and the visa applicant in the period prior to the application and no evidence of joint financial arrangements or joint major assets or liabilities. It was not satisfied that the photographs taken at social gatherings at the nominator's Penrith home established that the applicant and nominator

lived together in a spouse relationship during that time. Nor, in the absence of other evidence regarding the duration of the relationship, was it satisfied that a statutory declaration from the applicant's sister dated 21 February 2001 claiming that the nominator and visa applicant had been living together for two years was sufficient to establish that the applicant and nominator were in a longstanding relationship at the time of application.

31. The Tribunal also had regard to the lack of evidence regarding the religious ceremony the applicant claimed had occurred in December 1998. It noted that the visa applicant and her mother had made conflicting claims about the date in December 1998 on which she married the nominator (whose divorce from his former wife was not granted until March 1999).

32. Further, the Tribunal took into account evidence from the nominator and from third parties that the relationship between the nominator and the visa applicant appeared to have ended a few months after they moved into the home the nominator had built in Queensland (which elsewhere was recorded as being in early 2000), the evidence of the applicant giving a Sydney address when requesting a Medicare letter in July 2001 and her comments on that information.

33. The Tribunal found:

On balance, the Tribunal is not satisfied from the evidence that the primary visa applicant and the nominator were in a longstanding spouse relationship of at least two years at the time of application.

34. It is apparent from the findings and reasons part of Tribunal decision that, while it did not discuss the nominator's alcoholism at length, it nonetheless was aware of the applicant's claims in this respect. It recorded the applicant's explanation that the reason she spent a lot of time in Sydney was because the nominator's problems with alcohol had become worse. It understood and considered the claims relating to domestic violence because of alcoholism. However it was open to the Tribunal, in the context of determining whether there were compelling reasons consisting of a longstanding spouse relationship of at least two years at the time of application, to conclude on the material before it

that it was not satisfied from the evidence that there was such a relationship.

35. In effect the applicant takes issue with the Tribunal's failure to accept her claims that, although she was spending a lot of time in Sydney because the nominator's alcoholism made him difficult to live with, they nonetheless continued to be in a genuine relationship. However the Tribunal had regard to these claims but did so in the context of all the other evidence that was before it in relation to the relationship. In that context the significance that the applicant attributed to the nominator's alcoholism and drinking problems, together with the other evidence, was not such as to persuade it that the couple had been in a longstanding spousal relationship for at least two years at the time of application.
36. Moreover, in recognition of the fact that compelling reasons were not limited to those contained in policy, the Tribunal went on to consider whether the evidence the applicant had presented in relation to her allegation that she was the victim of domestic violence perpetrated by the nominator established that at the time of application there were compelling reasons for not applying Schedule 3 criteria. It is apparent from the manner in which the Tribunal considered this information that it took into account the context in which the evidence had been presented, including the history of the visa applicant's relationship with the nominator (including her evidence as to the nominator's drinking problem). However the Tribunal was not satisfied that this evidence (including the history of the applicant's relationship with the nominator) established that at the time of application there were compelling reasons for not applying Schedule 3 criteria. The Tribunal also stated that there was no other evidence before the Tribunal that established compelling reasons for not applying Schedule 3 criteria. It has not been established that the Tribunal failed to apply the right test in this regard.
37. While the Tribunal subsequently went on to state that it had not made findings in relation to the evidence presented of alleged domestic violence, this is clearly a reference to the actual events which were said to constitute domestic violence for the purposes of meeting visa criteria relating to domestic violence. This is made apparent by the Tribunal's

explanation that it did not do so because it had found that the visa applicant had not satisfied an essential criterion at the time of application for the grant of a subclass 820 visa. The domestic violence provisions in Division 1.5 of the *Migration Regulations 1994* are only relevant if an applicant can first satisfy the provisions of the visa class at the time of application. As the applicant could not do so in this case, the provisions of Division of 1.5 had no relevance.

38. Insofar as it is intended to be contended that the applicant's evidence suggested or raised the possibility that the nominator's drinking problems constituted compelling reasons, that is not apparent on the material before the Court. I note first that in the letter under s.359A of the Act the Tribunal indicated that it was necessary for it to be satisfied that there were compelling reasons for not applying the criteria in Schedule 3. It put certain information to the applicant about the relationship, evidence as to where the applicant had lived prior to the application and other matters on the basis that it may indicate that she was not in genuine and continuing relationship for two years prior to the visa application. In the response of 11 November 2003 from the applicant's migration agent, the comments in relation to the period preceding the time of the application referred to the couple having many rough times and suggested that they were on-and-off a couple of times. The letter simply referred to the domestic violence claims in response to the information that in July 2001 the nominator had informed the Department that the relationship had broken down eight months earlier. In relation to other specific items of information (including the applicant's statement that in January 2001 she left the nominator due to his drinking and spent two or three months in Sydney), the applicant requested the Tribunal to refer to her claims about domestic violence and the nominator's drinking in 2002. There was no suggestion that the nominator's drinking problems of themselves constituted compelling reasons.
39. It is also relevant that in the Tribunal hearing not only did the Tribunal explain that it was considering whether there were compelling reasons and in particular whether there had been a genuine relationship for two years, but it also indicated to the applicant at the commencement of the hearing that it would ask her whether she believed there may be other compelling reasons for not applying the Schedule 3 restrictions. It

reminded her that one must look at the situation at the time of application. After a lengthy discussion of its concerns as to the existence of a genuine relationship for the two years prior to June 2001, the Tribunal again told the applicant (at page 11 of transcript) that it could also take account of any other factor she believed relevant and asked her:

So is there any other reason or factor at that time June 2001 that you believe is compelling, strong or special reason for not applying this restriction in your case in other words for not stopping the processing. Do, do you understand the issue?

40. The applicant explained that she met the nominator in 1998, that they became good friends, that he referred to his amputation and told her brother he was looking for a girl to settle with, that they got together, she moved in but that they could not get married at that time because he was not yet divorced and that was why they waited until after the divorce went through. When asked if there was any other factor she wanted the Tribunal to consider she stated that that was the only reason.
41. Further, after asking the applicant about the domestic violence she complained of in mid-2002, at the end of the Tribunal hearing the Tribunal member again asked at the applicant if there was anything she would like to add as to whether there were compelling reasons not to apply the Schedule 3 criteria at the time of the application (or anything further about the relationship or the subsequent breakdown of the relationship). The applicant had nothing to add except to state that she tried her best for the relationship to work out “*but it didn’t work*”. She was then given an opportunity to submit further written evidence after the Tribunal hearing.
42. In other words, there was no claim made or apparent on the material before the Tribunal to suggest that the nominator’s drinking problems of themselves constituted compelling reasons. The difficulty for the applicant in relation to this ground is that while the Tribunal was aware of her explanation that she spent a lot of time in Sydney because of the nominator’s problem with alcohol and that she claimed that the relationship was nonetheless genuine, it was not on balance satisfied

that this was so. Its findings in that respect were open to it on the material before it. No error is established in the manner contended.

Whether tribunal erred in failing to enquire

43. It was also submitted that the Tribunal erred in failing to enquire into the significance of the nominator's alcoholism in particular as to the circumstances that obliged the applicant, whose evidence was that she wished to be with her spouse at the relevant time, to live with family in Sydney.
44. It was contended for the applicant that in the hearing the Tribunal did not make all of the enquiries it could have made to get the "full picture" of the circumstances in which the nominator and the visa applicant had lived, particularly in light of her evidence (in statements in relation to her application for a temporary protection order and in a letter to the Department dated 22 July 2002) that they had been together until June 2002 and *"since then I have been living in and on-and-off de facto relationship with him. I have now separated from him permanently on 21/6/2002"*. It was suggested that the interpretation the Tribunal gave to the phrase "on-and-off" determined whether or not the applicant would succeed in persuading the Tribunal that a genuine relationship had been in existence for two years prior to the application and in these circumstances the Tribunal erred in failing to make further enquiries.
45. Counsel for the applicant pointed out that in the hearing of 13 January 2004 the Tribunal established that it considered that the threshold issue was the question of whether there were compelling reasons to waive the restrictions that applied to processing the applicant's case. It told the applicant that there had to be something more than the actual existence of the marriage itself and that the government gave two examples of compelling reasons including satisfaction that the applicant and nominator had been in a spouse relationship for a considerable period of time for at least two years before the application was made. The Tribunal enquired about the financial relationship between the parties and a Medicare card the applicant had been asked to be sent to a Parramatta address in July 2001 (indicating that she was

not residing with the nominator in Queensland). The hearing continued:

APPLICANT: Normally, at that time he was drinking. He started drinking then I had to from Queensland I had to come back to Sydney, stay with my mum and he calls my brothers and he says to him he won't do it again so I have to go back to Queensland. At that time I was moving from Queensland to Sydney.

TRIBUNAL MEMBER: So you say you spent time in Sydney because of this drinking problem.

APPLICANT: Yes on and off.

TRIBUNAL MEMBER: But you went back to Queensland.

APPLICANT: Yeah I went back to, he became very sick after that then I have to go back to him he was admitted in the hospital.

46. Thereafter the Tribunal recorded that it told the applicant that in June 2002 the nominator had said that in 2001 the applicant had only stayed for a total period of three months in Queensland. The applicant responded:

I have to come back and come go back there and come back again here because of his drinking problem. It was very hard for me to stay with him.

47. She maintained that she spent about six months in Queensland at the time they were building the house together and admitted to the Tribunal that she had had an “on-and-off relationship with the nominator”. The Tribunal put to her that this did not seem to indicate that it was a relationship of long standing and she replied:

Yeah I tried my very best to stay with him and I tried every possible way to help him out and stop him drinking but it didn't work.

48. Counsel for the applicant contended that in this context the Tribunal erred in failing to make further enquiries of the applicant about her evidence that she tried her best to stay with the nominator and to help him stop drinking. Instead the Tribunal asked about discrepancies in the applicant's estimate of the time she spent with the nominator and the time estimated by the nominator. The Tribunal also put to the

applicant the evidence of unspecified third parties about the limited time they had seen her with the nominator. It was submitted that the Tribunal erred in failing to make further enquiries of the applicant to clarify the significance of the nominator's alcoholism.

49. It was conceded that the Tribunal had put to the applicant that various things (including her statement to the Department that she left the nominator in January 2001 because of his drinking problem and stayed in Sydney for two to three months and that she had stated in June 2003 that she had been working as a nursing assistant in Sydney since May 2001 on a casual basis) *"indicate that there actually was little ongoing and strong commitment to the relationship between yourself and the nominator in the, certainly in the period before the application was made"*. However, it was pointed out the applicant had stated in response that the relationship was genuine. The Tribunal then stated that it seemed that for significant periods of time they were actually living apart and the applicant replied: *"Yeah, I had no other choices to come back and stay here in Sydney than I used to ask money for my mum and from my family so it was really very hard for me"*. The applicant's counsel took issue with the fact that the applicant was not asked to expand on this response.
50. It was suggested that it was the duty of the Tribunal to inform itself of the matters before it and that in order to make findings of fact it needed to inform itself of all of the evidence and that it had not done so. This was said to be apparent not only in its failure to refer to particular items of information such as the medical reports but also in its failure to make enquiries. In support of the contention that the Tribunal's failure to make enquiries constituted a jurisdictional error reference was made to the decision of Allsop J in *Azzi v Minister for Immigration & Multicultural Affairs* [2002] FCA 24 referring to authorities such as *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 and *Luu v Renevier* (1989) 91 ALR 39 in which it had been suggested that in some circumstances a decision-maker who unreasonably fails to ascertain relevant facts known to be readily available will be taken to have exercised the decision-making power improperly.
51. No jurisdictional error is established on this basis. First it is well established that a provision such as s.363(1)(d) of the Migration Act

confers a power but creates no duty to enquire (see *Gomez v Minister for Immigration & Multicultural Affairs* (2002) 190 ALR 543 at 26; *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [43] and *SXFB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 164 at [8]).

52. Insofar as it is contended that the applicant was denied procedural fairness, I note that s.357A is applicable. *Minister for Immigration & Multicultural & Indigenous Affairs v Lay Lat* [2006] FCAFC 61 suggests that the provisions of Division 5 of Part 5 of the Act are an exhaustive statement of the natural justice hearing rule (although see *Antipova v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 584). Even if there is some room for the operation of principles of procedural fairness despite s.357A, I note that, as Allsop J stated at in *Azzi* at [112], if a duty to enquire does exist or does arise in particular circumstances “*these are understood as being exceptional or rare*”. This is not such a case. It cannot be said that as in *Prasad* at 176 it was obvious there was readily available to the decision-maker “*other factual material*” which was “*centrally relevant*” or which was “*likely to be of critical importance in relation to a central issue for determination, and which is not been obtained*” (*Luu v Renevier* at [33]). A mere failure to pursue a particular line of questioning is not in the circumstances of this case such as to establish that the Tribunal unreasonably failed to ascertain relevant facts known to be readily available.
53. As Gummow and Hayne JJ stated in *Abebe v Commonwealth* (1999) 197 CLR 510 at [187] “*it is for the applicant to advance whatever evidence or argument she wishes to advance*” and as Kirby J stated in *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389 at [78] “*The function of the Tribunal ... is to respond to the case that the applicant advances.*” The Tribunal gave the applicant several opportunities to elaborate on her claims. She had the opportunity to address the significance of the nominator’s alcoholism if she chose to do so. “*The Tribunal conducting an inquisitorial hearing is not obliged to prompt and stimulate an elaboration which the applicant chooses not to embark on*” (*Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 201 ALR 437 per Gummow and Heydon JJ at [58]).

54. No lack of procedural fairness is established. Nor in failing to enquire did the Tribunal fail to exercise its jurisdiction as contended. In particular, no unreasonableness, let alone unreasonableness amounting to jurisdictional error, has been established in this case. On the contrary. While the Tribunal might not have pursued particular answers of the applicant during the hearing in the manner that counsel for the applicant suggested was appropriate, it nonetheless gave the applicant every opportunity to put information before it. It invited her on a number of occasions to address the specific issue in question and gave her an additional opportunity to provide whatever information she sought to put before it.
55. As no jurisdictional error has been established the application must be dismissed.

I certify that the preceding fifty-five (55) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 16 June 2006